

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 25,047

In re: 6101 16th Street, N.W., Unit 901

Ward Four (4)

WILLETE COLEMAN
Tenant/Appellant

v.

RITTENHOUSE, LLC, ET AL.
Housing Providers/Appellees

DECISION AND ORDER

April 30, 2002

LONG, COMMISSIONER. This case is before the District of Columbia Rental Housing Commission (Commission) pursuant to the Rental Housing Act of 1985 (Act), D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001). The District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510 (2001) and the District of Columbia Municipal Regulations, 14 DCMR §§ 3800-4399 (1991), also govern the proceedings.

I. PROCEDURAL HISTORY

Willette Coleman began her tenancy at the multi-unit housing accommodation, known as the Rittenhouse, in July 1998. On August 14, 2000, she filed Tenant Petition (TP) 25,047 with the Rental Accommodations and Conversion Division (RACD). Ms. Coleman alleged that the housing provider, Sawyer Management, increased her rent while there were substantial housing code violations in her rental unit.

The Office of Adjudication (OAD) scheduled the hearing for October 19, 2000. On that date, Hearing Examiner Gerald Roper convened the OAD hearing. The hearing examiner administered an oath to the individuals who intended to testify and instructed the parties on the hearing procedures. The hearing examiner identified Eric Von Salzen, the attorney for Sawyer Management; Willette Coleman, the tenant, who was not represented by counsel; and Rev. Graylon Hagler, who was the tenant's witness. The hearing examiner asked the parties to attempt to conciliate the matter "off the record." OAD Tape Recording (Oct. 19, 2000). The hearing examiner advised the parties that he would not participate in the conciliation; however, he stated that he might be able to get someone to help if there was something that needed clarification. Thereafter, the hearing examiner read the issue into the record and advised the parties that he would allow them to talk "among themselves." Id. The hearing examiner stated that he would go forward with the hearing on the merits if the parties could not resolve the dispute. The hearing examiner concluded his remarks, stated that he was going off the record, and he stopped the tape recording. There was no indication of the length of time the parties were off the record.

When the hearing examiner resumed the recording, he indicated that the parties did not settle the matter. He stated that he was going to reschedule the hearing to allow the tenant to amend the petition. The hearing examiner stated that he and the parties agreed to a new hearing date. He ended the hearing by stating that he was going to "conclude this part of the hearing and reconvene in December." Id. There was no record evidence concerning the reason why the hearing examiner rescheduled the hearing to permit the tenant to amend the petition. In addition, when the hearing examiner resumed

the recording, he stated that he and the parties agreed to a hearing date. However, there is no tape recording of that portion of the discussion.

On October 24, 2000, the tenant filed an amended petition. The tenant listed Rittenhouse, LLC as the housing provider. The tenant alleged that there were substantial housing code violations when the housing provider increased her rent, and the petition contained additional comments concerning the alleged violations.

On December 7, 2000, the hearing examiner held the rescheduled hearing. He received testimonial and documentary evidence from Willette Coleman, the tenant, pro se, and Sherry Burks, the Community Manager for Sawyer Management. Eric Von Salzen appeared as counsel for Sawyer Management and Rittenhouse, LLC. At the conclusion of the hearing, the hearing examiner asked the parties to submit closing arguments in the form of proposed decisions and orders. The housing provider submitted a proposed decision and order on December 28, 2000, and the tenant filed an opposition to the housing provider's proposed decision on January 4, 2001. On October 5, 2001, Hearing Examiner Roper issued the decision and order, which contained the following conclusions of law:

1. The Rent Administrator lacks jurisdiction to accept Petitioner's challenge to the September 1, 2000 rent adjustment because notice thereof was not included in her October 24, 2000 amended Tenant/Petition Complaint, pursuant to D.C. Code Sect. 1-1509(a).¹
2. Substantial housing code violations existed in Petitioner's unit, on September 1, 1999 and March 1, 2000, of which Respondent had knowledge, pursuant to 14 DCMR 4216.2(u).
3. Petitioner failed to carry her burden of proof as to the amount of the monthly rent increases that were implemented for her unit on September 1,

¹ Currently, D.C. OFFICIAL CODE § 2-509(a) (2001).

1999 and March 1, 2000, pursuant to D.C. Code Sect. 1-1509(b);² 14 DCMR Sect. 4003.1 (1991).

4. Petitioner failed to carry her burden of proof, pursuant to 14 DCMR Sect. 4003.1 (1991), that Respondent implemented monthly rent increases for her rental unit, on September 1, 1999 and [M]arch 1, 2000, in violation of D.C. Code Sect. 45-2518(a)(1)(A).³

Coleman v. Rittenhouse, LLC, TP 25,047 (OAD Oct. 5, 2001) at 6-7. The hearing examiner dismissed the tenant petition with prejudice.

On October 25, 2001, the tenant, pro se, filed a notice of appeal with the Commission, and she filed the brief on appeal on January 9, 2002. The housing provider, through counsel, filed a responsive brief on January 18, 2002. On January 22, 2002, the Commission held the appellate hearing.

II. ISSUES

The tenant raised the following issues in the notice of appeal.

1. The hearing examiner erroneously concluded in the **DECISION & ORDER** that I failed to "introduce into evidence the rent increase notices for either the September 1, 1999 or March 1, 2000 adjustments or any other evidence as to the amount of the monthly increases that were implemented for her unit on each date." Therefore, Finding of Fact 7 and Conclusions of Law 3 and 4 should be reversed, and the case remanded to the Hearing Examiner with directions to find in favor of the Tenant/Petitioner.

2. The hearing examiner committed an error of law in dismissing my challenge to a rent increase notice of July 26, 2000, to take effect on September 1, 2000, by claiming I had to specifically raise the challenge in my October 19, 2001, amended complaint. **DECISION & ORDER** at 4. Therefore, Finding of Fact 4 and Conclusion of Law 1 should be reversed, and these issues as well remanded to the Hearing Examiner with directions to find in favor of the Tenant/Petitioner.

² Id.

³ Currently, D.C. OFFICIAL CODE § 42-3502.18(a)(1)(A).

3. The hearing examiner committed plain error in a decision that violates the D.C. Administrative Procedure Act, 1 [sic] D.C. Code § 1501 et seq.
4. The tenant/respondent [sic] alleges numerous specific errors that clearly demonstrate that the hearing examiner committed reversible error since the decision is arbitrary, capricious, an abuse of discretion, contrary to law, and devoid of substantial evidence to support the findings.
5. The tenant/respondent [sic] files this Notice of Appeal with the Rental Housing Commission since the errors of law and fact violate the District of Columbia Administrative Procedure Act, 1 [sic] D.C. Code § 1501 et seq.
6. The decision in TP 25,047 is arbitrary, capricious, an abuse of discretion, and contrary to law.
7. Moreover Findings of Fact 4 and 7 and Conclusions of Law 1, 3, and 4 are not supported by substantial evidence and the Hearing Examiner incorrectly ruled that Tenant/Petitioner failed to satisfy his [sic] burden of proof, namely preponderance of the evidence. See 1 [sic] D.C. Code § 1-1509; 45 [sic] D.C. Code § 45-2526. The Tenant/Petition deems the errors as so substantial that a Motion for Reconsideration will not alleviate the injury done by this decision.
8. Did the hearing examiner commit reversible error in Finding of Fact 7 and Conclusions of Law 3 and 4 by concluding that the Tenant/Petitioner had not submitted evidence sufficient to show rent increases implemented for her unit on September 1, 1999 and March 1, 2000.
9. Did the hearing examiner commit reversible error in Findings of Fact 4 and 7, and Conclusions of Law 1, 3, and 4 by failing to take official notice of the Rittenhouse housing files, including any documentation in those files on the Tenant Petitioner's unit 901, as required by 14 D.C.M.R. § 4007.1(f) – (g) and 14 D.C.M.R. § 4009.7 – 4009.9, as well as Johnson v. District of Columbia Rental Hous. Comm'n, 642 A.2d 135 (D.C. 1984).
10. Did the hearing examiner commit reversible error in Finding of Fact 4 and Conclusion of Law 1 by failing to understand that the rent increase notice, effective September 1, 2000, was dated July 26, 2000, and hence already covered by the original Tenant Petition filed and dated August 14, 2000?
11. Did the hearing examiner commit reversible error in Finding of Fact 4 and Conclusion of Law 1 by dismissing the July 26, 2000, rent increase notice that took effect on September 1, 2000 with prejudice?

Notice of Appeal at 1-4.

III. DISCUSSION

A. Whether the hearing examiner committed reversible error in Finding of Fact 7 and Conclusions of Law 3 and 4 by concluding that the tenant had not submitted evidence sufficient to show rent increases implemented for her unit on September 1, 1999 and March 1, 2000.

In the brief submitted in support of the appeal, the tenant asserted that she submitted copies of the rent increase notices on the first day of the hearing. In the brief the tenant stated, "I followed instructions, handed the rent increase notices for Exhibit purposes to the Hearing Examiner and Mr. Von Salzen and raised issues related to the improper rent ceilings and rents charged." Tenant's Brief at 3. The tenant stated that the tape recording does not reflect the submission of the rent increase notices, because "Hearing Examiner Roper turned it off to consider whether the parties could settle their differences." Id.

When the Commission reviewed the tape recording of the October 19, 2000 hearing, the Commission discovered that the hearing examiner failed to record the entire proceeding. In fact, the tape recording reveals that the hearing examiner stopped the recording in order to permit the parties to attempt to settle the matter. When the hearing examiner resumed the recording, he indicated that the settlement negotiations were unfruitful; he stated that he was going to reschedule the hearing to enable the tenant to amend the petition; and the hearing examiner stated that he and the parties agreed to a new hearing date. The tape recording did not capture a discussion concerning the reason for the amendment, and the discussion wherein the hearing examiner and the parties agreed to a

hearing date was not found on the tape. The hearing examiner's recorded statement that he was going off the record, and the absence of these discussions demonstrates that the hearing examiner failed to record the entire proceeding.

The regulation, 14 DCMR § 4006.1 (1991), provides that the "entire proceedings of hearings and other matters shall be recorded on tape ..." (emphasis added). Moreover, 14 DCMR § 4000.1 (1991), requires the hearing examiner to conduct the adjudicatory hearing and maintain the record in accordance with the procedures established by the DCAPA, which provides:

The Mayor or the agency shall maintain an official record in each contested case, to include testimony and exhibits The testimony and exhibits, together with all papers and requests filed in the proceeding, and all material facts not appearing in the evidence but with respect to which official notice is taken, shall constitute the exclusive record for order or decision. No sanction shall be imposed or rule or order or decision be issued except upon consideration of such exclusive record, or such lesser portions thereof as may be agreed upon by all the parties to such case.

D.C. OFFICIAL CODE § 2-509(c) (2001).

The DCAPA requires the agency to preserve the testimony and exhibits in every contested case. "Inherent in the DCAPA requirement that 'testimony' be preserved is [the requirement] that all of the testimony be preserved, unless the parties agree to a lesser portion. In this case, the parties have not agreed to a lesser portion of the testimony." Joyce v. Webb, TPs 20,720 & 20,739 (RHC July 31, 2000) at 9-10 (emphasis added). In addition, the regulation, 14 DCMR § 4006.1 (1991), requires the hearing examiner to preserve the testimony and the submission of documentary evidence by recording the entire proceeding. When the hearing examiner fails to record the entire proceeding, the Commission is compelled to remand the matter, since the Commission cannot review the entire record without the complete recording. See Youssef v. Cowan,

TP 22,784 (RHC Sept. 27, 2000) (holding that the hearing examiner's failure to preserve all of the hearing tapes necessitated a remand for a hearing de novo, because the Commission was unable to review the testimony or determine whether relevant documents were entered into evidence). See also Burnett v. Sharma, TP 24,910 (RHC Oct. 3, 2000); Dorchester House Assocs. v. Tenants of Dorchester House, CI 20,672 & TPs 22,558, 23,520, 23,909, 23,973 (RHC June 3, 1997).

When the hearing examiner convened the hearing on October 19, 2000, he administered an oath to the parties and described the procedures for submitting testimonial and documentary evidence. The tenant, pro se, argues on appeal that she followed the hearing examiner's instructions and submitted the rent increase notices that showed the amount of the rent increases.

Since "the Commission's function does not extend to making findings,"⁴ the Commission cannot determine the veracity of the tenant's assertion that she submitted the rent increase notices during the OAD hearing. However, the record reveals that the hearing examiner failed to record the entire proceeding; and the hearing examiner's recorded statements revealed that discussions occurred "off the record." The hearing examiner's failure to hold the hearing in accordance with the DCAPA and record the entire proceeding in accordance with 14 DCMR § 4006.1 (1991) is reversible error. See Burns v. Charles E. Smith Mgmt., Inc., TP 23,962 (RHC June 18, 1999) (holding that the hearing examiner's on the record statement, that he held discussions off the record was reversible error).

In the Responsive Brief, the housing provider, through counsel, argues that the law compelled the hearing examiner to deny the tenant's claim, because

⁴ Smith v. District of Columbia Rental Accommodations Comm'n, 411 A.2d 612, 617 (D.C. 1980).

she failed to provide evidence of the amount of the rent increases. In support of its position, the housing provider quoted Rosenboro v. Askin, TPs 3991 & 4673 (RCH Feb. 26, 1993) at 24, where the Commission held: "We find that the record as a whole supports the hearing examiner's determination that the record lacked substantial evidence to prove what rents were paid by the tenant during the period in question." (emphasis added). The record, in the instant case, is not whole, because the hearing examiner failed to record the entire proceeding. Consequently, the Commission cannot review the record to determine whether the tenant submitted the relevant documents.

Accordingly, the Commission reverses the hearing examiner's determination that the tenant failed to carry her burden of proof as to the amount of the rent increases that the housing provider implemented when there were substantial housing code violations. The Commission vacates the decision and order issued on October 5, 2001 and remands this matter for a hearing de novo.

B. Whether the hearing examiner committed reversible error in Findings of Fact 4 and 7, and Conclusions of Law 1, 3, and 4 by failing to take official notice of the Rittenhouse housing files, including any documentation in those files on the Tenant Petitioner's unit 901, as required by 14 DCMR § 4007.1(f)-(g), 14 DCMR §§ 4009.7-4009.9, and Johnson v. District of Columbia Rental Hous. Comm'n, 642 A.2d 135 (D.C. 1984).

The tenant argues, in the alternative, that the hearing examiner erred when he concluded that the tenant failed to prove the amount of the monthly overcharges, because the hearing examiner failed to take official notice of the housing provider's RACD registration file. Citing 14 DCMR §§ 4007.1(f)-(g) & 4009.7-4009.9 (1991), and Johnson v. District of Columbia Rental Hous.

Comm'n, 642 A.2d 135 (D.C. 1984), the tenant maintains that the law imposes a duty upon the hearing examiner to take official notice of facts that the proponent of the evidence fails to introduce.

"During a hearing, a hearing examiner, on his or her own motion or on the motion of a party, may take official notice of ...[a]ny information contained in the record of the RACD." 14 DCMR § 4009.7 (1991). The use of the term "may" denotes discretion.⁵ The regulation empowers the hearing examiner to exercise his discretion and take official notice of the RACD registration file. However, the regulation does not impose an affirmative duty upon the hearing examiner to take official notice of the housing provider's registration file. "Official notice taken of any fact shall satisfy a party's burden of proving that fact." 14 DCMR § 4009.8 (1991). However, "the failure of an examiner to take official notice of documents in the OAD record," is not reversible error unless the hearing "examiner fails to take official notice after a witness ... testified that the documents were in the OAD file." Youssef v. Cowan, TP 22,784 (RHC Sept. 27, 2000) at 23-24.

Moreover, 14 DCMR § 4009.9 (1991) provides: "If, after a hearing has been concluded, the hearing examiner takes official notice of information contained in public records, as described in this section, each party is entitled to be informed in writing of the fact found by the hearing examiner, and to be provided an opportunity to contest the fact(s) officially noticed." The use of the

⁵ "[I]n construction of statutes, and presumably also in the construction of federal rules ... the word 'may' as opposed to 'shall' is indicative of discretion or choice between two or more alternatives, [but] the context in which the word appears must be the controlling factor." U.S. v. Cook, 432 F.2d 1093, 1098 (7th Cir. 1970) cited in BLACK'S LAW DICTIONARY 979 (6th ed. 1990).

term “if” in 14 DCMR § 4009.9 (1991) also illustrates the discretionary nature of the hearing examiner’s power to take official notice.

The regulation, 14 DCMR § 4007.1 (f)-(g) (1991), simply provides that “[t]he record of a proceeding at RACD shall consist of the ... [l]andlord registration files and any other documents found in the public record of which the Rent Administrator took official notice; and ... [a]ll pleadings filed with the Rent Administrator.

The tenant cites the Court’s decision in Johnson v. District of Columbia Rental Hous. Comm’n, 642 A.2d 135 (D.C. 1984) as additional proof that the hearing examiner has an affirmative duty to take official notice of the RACD registration file. The DCAPA, which governs the hearing examiner’s proceedings, provides the following: “Where any decision of any agency in a contested case rests on official notice of a material fact not appearing in the evidence in the record, any party to such a case shall on timely request be afforded an opportunity to show the contrary.” D.C. OFFICIAL CODE § 2-509(b) (2001). In Johnson, the Court held that the Commission’s failure to give the tenant an opportunity to show the contrary of facts officially noticed was contrary to § 2-509(b) and Carey v. District Unemployment Compensation Bd., 304 A.2d 18, 20 (D.C. 1973). The Court, in Johnson, held that the Board in Carey erred when it took official notice of an agency record without “notifying petitioner that the Board was invoking its prerogative to take official notice of a nonrecord fact.” Id. at 139 (emphasis added). Accordingly, Johnson, which discussed the proper method of taking official notice, does not stand for the proposition that the DCAPA or the regulations impose an affirmative duty on the hearing examiner to take official notice of facts that do not appear in the

record. The Court's use of the term "prerogative" connotes the discretionary nature of the agency's use of official notice.

Accordingly, the hearing examiner did not err when he elected not to exercise his prerogative to take official notice of the housing provider's RACD registration file. However, the hearing examiner's failure to record the entire proceeding was reversible error and necessitated a remand. See supra Issue A. On remand, the hearing examiner shall record the entire proceeding and afford the parties an opportunity to present evidence concerning the issues raised in the tenant petition. The hearing examiner may exercise his discretion to take official notice of the registration file, or the tenant may request the hearing examiner to take official notice in accordance with the regulations and case law.

C. Whether the hearing examiner committed reversible error in Finding of Fact 4 and Conclusion of Law 1 by failing to understand that the rent increase notice, effective September 1, 2000, was dated July 26, 2000, and hence already covered by the original Tenant Petition filed and dated August 14, 2000?

D. Whether the hearing examiner committed reversible error in Finding of Fact 4 and Conclusion of Law 1 by dismissing the July 26, 2000, rent increase notice that took effect on September 1, 2000 with prejudice.

The tape recording of the hearing convened on October 19, 2000 reflects that the hearing examiner stopped the recording for settlement negotiations. When the hearing examiner resumed the recording, he stated that he would permit the tenant to amend the complaint, and he rescheduled the hearing to December 7, 2000. The tape recording did not capture a discussion concerning the reason for the amendment.

On October 24, 2000, the tenant filed an amendment to the petition filed on August 14, 2000. In each document, the tenant alleged that the housing provider increased her rent while her unit was not in substantial compliance with the housing regulations. In the amended petition, the tenant named Rittenhouse, LLC as the housing provider. The initial complaint listed Sawyer Management, which is the property manager that the owner, Rittenhouse, LLC, employs. Eric Von Salzen appeared on October 19, 2000 and December 7, 2000 as counsel for Sawyer Management and Rittenhouse, LLC.

On December 7, 2000, the tenant testified that she challenged the rent increases that the housing provider implemented in September 1999, March 2000, and September 2000. The housing provider's witness testified that the housing provider issued a rent increase notice on July 26, 2000 for the September 1, 2000 adjustment.

The housing provider did not object to the tenant's testimony concerning the adjustment that the housing provider implemented on September 1, 2000; and the housing provider's attorney did not allege a lack of notice of the tenant's allegation concerning the September 1, 2000 adjustment. Moreover, the hearing examiner did not raise, on the recorded portions of the hearing, any concerns with respect to the tenant's challenge to the September 1, 2000 adjustment.

When the hearing examiner issued the decision and order, he found that the tenant "failed to provide notice of her challenge to the September 1, 2000 adjustment in her amended Tenant/Petition Complaint, dated October 24, 2000." Finding of Fact 4. The tenant argues that the hearing examiner erred, because he failed to understand that the original tenant petition filed on August 14, 2000

covered the rent increase notice that was dated July 26, 2000 for the increase that was effective on September 1, 2000.

There is no record testimony or documentary evidence concerning the rent increase notices. The tenant alleged that she submitted the rent increase notices on October 19, 2000. She further alleged that the record does not reflect the submission of the notices, because the hearing examiner stopped the recording during the proceeding on October 19, 2000. In Part III, Issue A, the Commission held that the hearing examiner committed reversible error, when he stopped the recording and failed to record the entire proceeding. Consequently, the Commission ordered a hearing de novo.

Since there is no record testimony or documentary evidence of the rent increase notices, the Commission cannot review the documents and determine whether the notice for the September 1, 2000 adjustment was dated July 26, 2000. Because the hearing examiner's error led to the remand for a hearing de novo, Issues C, D, and the remaining issues raised in the notice of appeal are moot. The hearing examiner shall conduct the hearing in accordance with the DCAPA and the regulations, and give due consideration to the record evidence.

IV. CONCLUSION

The hearing examiner committed reversible error when he failed to record the entire proceeding. Consequently, the Commission reverses and vacates the decision and order issued on October 5, 2001 and remands this matter for a hearing de novo. Since the hearing de novo is a new hearing, the parties shall submit all documentary and testimonial evidence required to support or rebut the

claims raised in the tenant petition. The hearing examiner shall record the entire proceeding. Documentary evidence shall be described and marked for identification purposes on the record. The hearing examiner shall record all testimony, statements, discussions, and submissions that are given in the hearing examiner's presence.

SO ORDERED.


RONALD A. YOUNG, COMMISSIONER

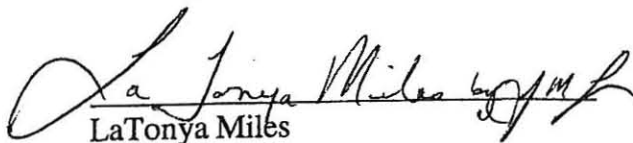

JENNIFER M. LONG, COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision and Order in TP 25,047 was mailed by priority mail with delivery confirmation, postage prepaid, this 30th day of April 2002 to:

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